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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

EXXON CORPORATION,

Petitioner,

vs.

JOHN RICHARD LUDBROOKE YOUELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does state law or federal maritime law provide the rule of decision in a marine insurance coverage dispute when the court (a) determines that there is no federal precedent on point, and (b) does not determine that there is any need for a uniform federal rule?

2. Is a district court's discretion to dismiss an insurer's federal declaratory judgment action, in deference to a policyholder's pending state court action raising the same issues, governed by the six-factor test announced in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), or by the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, as construed by this Court in *Brillhart* v. *Excess Insurance Co. of America*, 316 U.S. 491 (1942)?

THE PARTIES

The Petitioner in this action is Exxon Corporation ("Exxon"). Exxon has no corporate parent. A list identifying Exxon's non wholly-owned subsidiaries appears at Appendix C.

The Respondents are John Richard Ludbrooke Youell, an underwriter at Lloyd's London, for himself and as a representative of those other underwriters severally subscribing to certain Global Corporate Excess Insuring Agreements at issue, and certain London Market Insurance Companies and other underwriting entities. A list identifying respondents appears at Appendix D.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 48 F.3d 105 and is reprinted as Appendix A hereto. The Memorandum decision of the United States District Court for the Southern District of New York (Preska, J.) is available only on the Westlaw and Lexis electronic databases and is reprinted as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Admiralty Clause of the United States Constitution, U.S. Const. art. III, § 2, states in pertinent part: "The judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction."

28 U.S.C. § 1333(1), provides:

> **§ 1333. Admiralty, maritime and prize cases**
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides in pertinent part:

> "In a case of actual controversy within the jurisdiction . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

STATEMENT OF THE CASE

This petition involves insurance consequences arising out of the accidental grounding of the *Exxon Valdez* in Alaska and the resulting catastrophic oil spill. Petitioner Exxon Corporation ("Exxon") filed a state court action (the "Texas Action") asserting coverage under insurance policies issued by respondents.[1] Thereafter, respondents brought the

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[1] Exxon is insured under a comprehensive package of insurance known as Global Corporate Excess (GCE) Coverage (also referred to herein as the GCE Agreements). The respondents are more than 100 insurance companies and 150 underwriting syndicates on the 1988-89 GCE Coverage. Exxon's rights under Section I and IIIA of the GCE Coverage are being litigated in the Texas Action, and a trial date of January 16, 1996 has been set. Exxon's rights under another part of the GCE Coverage, Section IIIB, are the subject of arbitration.

Exxon named four insurance companies as defendants in the Texas Action that are not plaintiffs in the New York Action. All are presently in insolvency proceedings. One of the respondents, Qatar General Insurance & Reinsurance Co., is a plaintiff in the New York Action but is not a Texas defendant because Exxon has released its claim against that company. Another respondent, Norske Triton Insurance Co. Ltd., has been dismissed by stipulation in both actions.

present declaratory judgment action in federal court (the "New York Action"). The issue now before the Court is whether this duplicative federal action should proceed. In the Court of Appeals, this issue turned on the court's decision that one of the underlying substantive questions affecting insurance coverage should be resolved by creating new federal law rather than by applying settled state law.

(i) Background Facts

On March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, 25 miles south of Valdez, Alaska. Approximately 258,000 barrels of crude oil — about 20% of the ship's cargo — spilled into Prince William Sound. Eventually, a large portion of the oil washed onto adjacent shorelines. Exxon, as the owner of the cargo of crude oil, has incurred billions of dollars in expenses and liabilities for cargo loss, clean up, third-party claims, and related losses. On April 4, 1989, Exxon notified respondents that it would be claiming GCE Coverage for clean up expenses and third-party liabilities. By letters dated October 30, 1990, and November 12, 1990, respondents denied all of Exxon's claims. For three years after their denial of coverage, respondents adhered to that denial but continued to insist that Exxon provide additional information.

(ii) The Texas and New York Actions

On August 4, 1993, Exxon commenced the Texas Action against respondents due to their denial of Exxon's claims under the GCE Agreements. In the Texas Action, Exxon asserted claims for breach of contract, breach of respondents' covenant of good faith and fair dealing, and violations of the Texas Insurance Code.

Respondents reacted to the Texas Action by commencing a virtually identical New York Action seeking a declaration that "there is no coverage for Exxon's insurance claims arising out of the stranding of the EXXON VALDEZ and the

resultant oil pollution." One of the defenses raised in the Texas and New York Actions is that Exxon's alleged recklessness in permitting an alleged alcoholic employed by a subsidiary, Exxon Shipping Company, to command the *Valdez* rendered the losses caused by the stranding non-fortuitous. Exxon disputes this characterization of its conduct but maintains that, even if it were true, the governing law and insurance policy provisions would permit coverage. The explicit wording of the insurance policy provides coverage for any "accident" occurring "as the unforeseen result of an intentional act." In other words, *unforeseen* outcomes are covered even if the conduct is intentional, let alone if the conduct is reckless.

(iii) The District Court's Decision To Abstain

Exxon filed a motion to dismiss the complaint in the New York Action on several grounds, including abstention due to the pendency of the prior, virtually identical Texas Action. The District Court adopted Exxon's abstention argument and dismissed the complaint. In its abstention analysis, the District Court, as it was required to do under Second Circuit precedents (*see infra* p. 18-19, & n. 11), applied the "exceptional circumstances" test of *Colorado River* as modified by *Moses H. Cone*.[2] The District Court found the third factor — the danger of piecemeal litigation — to "be by far the most significant." (B13).

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[2] *Colorado River* abstention turns on a balancing of six factors: (1) whether either the state or federal court has assumed jurisdiction over a *res*; (2) the relative inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the actions were filed; (5) whether state or federal law provides the rule of decision; and (6) whether the state action will protect the federal plaintiffs' rights. *Moses H. Cone*, 460 U.S. at 23, 26 (announcing factors five and six); *Colorado River*, 424 U.S. at 818 (announcing factors one through four).

In addressing the fifth *Colorado River* factor (applicable law), the District Court held that "the heart of this matter is a dispute over an insurance policy which is governed primarily by state law." (B7). The District Court found that the federal issues identified by respondents as possible defenses to the claim — the allegedly preclusive effect of federal law on certain Alaska statutes and issues allegedly involving the Federal Arbitration Act — did not override the danger of piecemeal litigation. The District Court concluded that "the core and bulk of this action involves the application of state law in a context where the states have a strong interest in seeing their law applied. In such circumstances, the presence of a federal law issue in a small portion of the overall dispute does not carry the weight described in *Moses H. Cone*." (B10). Accordingly, the District Court stated that "factor five militates towards abstention, but only slightly." *Id.* The District Court held that the remaining factors were either neutral or weighed slightly in favor of abstention.

(iv) The Second Circuit's Reversal

The Second Circuit reversed. Although the Second Circuit reviewed the District Court's decision under an "abuse of discretion" standard, it "scrutinize[d] the legal issues underlying that decision *de novo*." (A8).[3] The Second Circuit held that, despite the pendency of the Texas Action, the District Court erred by abstaining from exercising jurisdiction over the New York Action. (A3). Referring to the six *Colorado River* factors, the Second Circuit noted that "[n]ot all factors are created equal" and that "[a] court will accord greater weight to those factors that bear more

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[3] The standard of appellate review of a district court's decision to abstain is a question currently pending before this Court in *Wilton* v. *Seven Falls Co.*, No. 94-562 (oral argument heard Mar. 27, 1995).

significantly on the case, and should thumb the scale in favor of exercising jurisdiction." (A7-A8).

Although the Second Circuit addressed all six factors, it reversed principally on the ground that the fifth factor, the source of the rule of decision, "heavily tilt[ed] against abstention." (A8). Despite this Court's statement that the fifth factor has "less significance" where, as here, the federal courts have concurrent jurisdiction with the state courts (*Moses H. Cone*, 460 U.S. at 25), the Court of Appeals held that an unsettled issue of "first impression" under federal admiralty law, namely, whether an insured that allegedly acts recklessly is permitted to obtain insurance coverage for its losses, "was truly a brooding omnipresence" and "all but demand[ed] that the federal court hear the case." (A13, A18). Even though the standard of fortuity was not an issue on appeal, the Second Circuit stated that "[w]hile negligent losses are fortuitous, and wilful ones are not, admiralty courts have yet to assign losses caused by the insured's own reckless conduct to either camp." (A11). The Second Circuit found this Court's "hallmark" decision in *Orient Insurance Co.* v. *Adams*, 123 U.S. 67 (1887), "equivocal as to the precise issue of whether a marine insurer is liable under a policy for losses caused by an insured's recklessness." (A11, A12). The Second Circuit confirmed that there was a risk of piecemeal litigation but found that the "possible annoyance that piecemeal litigation may cause here hardly offsets the commanding presence of a federal question of first impression." (A16).

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit, in Conflict with Other Courts of Appeals, Has Incorrectly Held that Federal Maritime Law Provides the Rule of Decision in a Marine Insurance Coverage Dispute When There Is No Federal Precedent on Point and No Determination of Any Need for a Uniform Federal Rule.

The Second Circuit's judgment in this case was premised on the conclusion that federal law rather than state law should provide the rule of decision for one aspect of the litigation. In reaching this conclusion, the court below used a test for determining the application of *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), that conflicts with the tests used in five other circuits.

In 1955, this Court held that state law presumptively governs marine insurance disputes absent a "judicially established" maritime principle on point or the need for a federal court to "fashion" such a rule. *Wilburn Boat*, 348 U.S. at 314. Since *Wilburn Boat*, the lower federal courts repeatedly have applied that decision to marine insurance disputes. Although the *Wilburn Boat* rule has percolated in the lower courts for 40 years, there is no agreement among the circuits as to the proper interpretation or application of *Wilburn Boat*. The Second Circuit is part of a conflict involving at least six circuits, and its decision demonstrates the lower courts' need for guidance on the proper application of *Wilburn Boat* and the circumstances in which federal maritime law displaces the presumptive application of state law. Indeed, by holding that federal maritime rather than state law applies to an insurance coverage question of "first impression," the Second Circuit's

decision turns *Wilburn Boat* on its head and undermines the principle that marine insurance coverage disputes presumptively are governed by state law.[4]

A. The *Wilburn Boat* Decision and the Role of State Law in Marine Insurance Disputes

In *Wilburn Boat*, the Wilburn brothers transferred title to their houseboat to a company that they had formed — the Wilburn Boat Company — and used the houseboat to ferry passengers across Lake Texoma. The boat was destroyed by fire while moored, and the Wilburn Boat Company made a claim against the insurers under a hull insurance policy. The policy, however, contained warranties against transfer of title to the vessel and its use for commercial purposes, both of which the Wilburns had breached. The insurer accordingly denied coverage. Both the district court and the Fifth Circuit held that, under federal maritime law, those breaches precluded coverage whether or not they caused the loss. The issue before this Court was whether state law or federal maritime law should apply to determine the effect of the insured's breach of warranty. The Court stated that, because states historically have had regulatory power over the business of marine insurance, in the absence of any firmly established federal admiralty law on point, state law should apply. This Court thus declared:

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[4] Exxon submits that if the Second Circuit correctly found the standard of fortuity to be a question of "first impression," *Wilburn Boat* teaches that that issue is governed by state law. Alternatively, Exxon maintains that the question purportedly of "first impression" has been resolved and that the Second Circuit's decision conflicts with this Court's decision in *Orient Ins. Co.* v. *Adams*, 123 U.S. 67 (1887). Under *Orient*, misconduct (including reckless conduct) is "fortuitous" and can be covered by insurance unless affected by "fraud or design." (*See* page 13-14 & n.10 *infra*)

> The control of all types of insurance companies and contracts has been primarily a state function since the States came into being . . . . Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been — with the States.

348 U.S. at 316, 320-21.

The Court stated that before federal maritime law would apply to override state law, two questions must be answered: (1) was there a "judicially established federal admiralty rule governing" the effect of breaching the warranties; and (2) if not, should the federal courts "fashion" one. *Id.* at 314. The Court went on to find that there was no such "judicially established" rule concerning the effect of a breach of warranty and, in view of adoption by the states of other possible rules, there was no need to "fashion" such a rule. *Id.* at 314-321.

Wilburn Boat acknowledges the historical right of the states, free from federal interference, to regulate insurance, including marine insurance.[5] The decision below creates

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[5] This principle is well-established. *See, e.g., Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve Sys.*, 472 U.S. 159, 179 (1985) ("the local nature of insurance is firmly ensconced in federal law.") (O'Connor, J concurring); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 415-417 (1946) (the "business of insurance is also of uniquely local concern."); *see also* 1 Wolcott B. Dunham, *New York Insurance Law* §1.06[3] at 1-17 (1994) ("Since the nineteenth century, the insurance business has been regulated primarily by the states").

uncertainty on the threshold issue of what law will govern the rights, duties, and obligations of marine insurers and their insureds. This Court therefore should resolve the disagreement among the circuits on the meaning of *Wilburn Boat*, provide the much-needed guidance to the lower courts on the interpretation of *Wilburn Boat*, and clarify the circumstances in which the presumption that state law governs the interpretation of marine insurance contracts is displaced by federal maritime law.

B. The Second Circuit's Decision Creates a Conflict with Other Circuits and Undermines the Principle of *Wilburn Boat* that State Law Presumptively Governs Marine Insurance Disputes.

The Second Circuit did not address whether, under *Wilburn Boat*, the standard of fortuity is "judicially established" in federal maritime law. Rather, the Second Circuit discussed the broader issue of whether the "fortuity" rule was a federal maritime rule. (A10).[6] This reading of *Wilburn*

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[6] After reviewing a selection of marine insurance cases, the Second Circuit stated: "That admiralty courts do not look exclusively to state law on the issue of fortuity indicates to us that the rule must have an independent existence in federal maritime law." (A10). Under *Wilburn Boat*, a rule must be "judicially established" as a federal maritime rule (or be the subject of a federal statute) before it displaces the presumptive application of state law. The Second Circuit did not find any such "judicial" establishment. The "fortuity" rule is, as the law has long recognized, a *general* insurance principle grounded in public policy that an insured cannot be indemnified against losses he intends to result from his own intentional conduct. *A&B Enterprises, Inc.* v. *Hartford Ins. Co.*, 198 A.D.2d 389, 390-91 (2d Dep't 1993) ("all risk policy covers all losses which are fortuitous") (non-marine insurance policy); *University of Cincinnati* v. *Arkwright Mut. Ins. Co.*, 1995 WL 222392 at *5 (6th Cir. April 17, 1995) (referring to implication in

Boat stands contrary to interpretations by the Fifth and Eighth Circuits. Those circuits have held that it is the particular issue in the case — here, the *standard* of fortuity — that must be "judicially established" under *Wilburn Boat* before the presumption of state law is displaced and federal maritime law becomes applicable. *See, e.g., 5801 Associates, Ltd.* v. *Continental Ins. Co.*, 983 F.2d 662, 665 (5th Cir. 1993) (discussing whether federal maritime rule exists with respect to the specific "severability" clause at issue and applying state law because two federal court opinions addressing an identical clause "hardly can be termed 'entrenched federal precedent' consistently used to control the conduct of maritime actors."); *Cargill, Inc.* v. *Commercial Union Ins. Co.*, 889 F.2d 174, 178 (8th Cir. 1989) (discussing the "other insurance" clause at issue and applying state law where the courts differed as to the meaning of that clause); *see also Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1489-90 (11th Cir. 1986) (referring to an admiralty rule that "covers the matter in issue").

Notwithstanding its failure to pose the correct question, the Second Circuit found that the "fortuity" standard was a question of "first impression." (A13). By holding that new federal law should be created to decide a marine insurance coverage question of "first impression" rather than applying settled state law — as counselled by *Wilburn Boat* — the Second Circuit has created a clear conflict with other circuits.

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insurance policy of fortuity rule as "universally recognized.") (applying Ohio law to non-marine insurance policy); *Restatement of Contracts* § 291 comment (a) (1932) (defining "fortuitous event"); Barry R. Ostrager and Thomas R. Newman, *Handbook on Insurance Coverage Disputes*, § 8.02[a] at 295 (7th ed. 1994) ("A Fortuity Requirement Is Inherent in the Nature of Insurance"); Abraham, *Environmental Liability and the Limits of Insurance*, 88 Colum. L. Rev. 942, 952-53 (1988) ("[T]he basic purpose of nearly all insurance [is] the provision of protection against harm that is fortuitous rather than caused intentionally by the insured.").

The Fifth Circuit applies the following three-part test to determine whether, under *Wilburn Boat*, state law should supply the rule of decision in a contract of marine insurance: "(i) whether the federal maritime rule constitutes 'entrenched federal precedent' which is consistently used to control the conduct of maritime actors, (ii) whether the state has a substantial and legitimate interest in having its law applied, and (iii) whether the state rule is materially different from the federal rule." *5801 Associates, Ltd.* v. *Continental Ins. Co.*, 983 F.2d 662, 665 (5th Cir. 1993); *Albany Ins. Co.* v. *Anh Thi Kieu*, 927 F.2d 882, 886-887 (5th Cir.), *cert. denied*, 112 S. Ct. 279 (1991).

Under the Fifth Circuit's three-part test, it is clear that state law would provide the rule of decision in Exxon's dispute with respondents.

First, assuming the Second Circuit correctly found the standard of fortuity to be a question of "first impression," there is no "federal rule" and, therefore, no "entrenched federal precedent."[7] Second, it is clear that Texas has a substantial and legitimate interest in having its law applied.[8] A Texas insured was denied insurance coverage in Texas by insurance companies doing business in Texas. Exxon has claimed in the Texas Action that the respondents' conduct

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[7] Where no specific federal rule exists — and there thus is no "entrenched" federal precedent — the Fifth Circuit, following *Wilburn Boat*, will apply state law. *See, e.g., Taylor* v. *Lloyds Underwriters of London*, 972 F.2d 666, 668 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1366 (1993).

[8] Exxon contends that Texas law should govern most of the important issues in this case. Respondents have argued that, to the extent state law governs, it should be New York law. If respondents are correct that New York law applies to any aspect of this litigation, that simply demonstrates that New York has a substantial and legitimate interest in having its law applied. Under the Fifth Circuit's well-established test, this points toward the application of state law.

constitutes a bad-faith response to Exxon's claim for coverage and is actionable under the Texas Insurance Code. Third, there is no material difference between the state and federal rule on fortuity. State law generally permits coverage for the unforeseen consequences of reckless or even intentional acts.[9] Indeed, this insurance coverage states that it covers all losses caused by the "unforeseen result of an intentional act." Federal maritime law is either nonexistent (under the Second Circuit's view) or to the same effect, generally providing insurance coverage for all conduct — including allegedly reckless conduct — falling short of "fraud or design." *Orient Ins. Co.* v. *Adams* 123 U.S. 67, 73 (1887) (permitting coverage for conduct falling short of "fraud or design").[10] Accordingly, under the Fifth Circuit's three-part

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[9] *See, e.g., Gulf Chem. & Metal Corp.* v. *Asst'd Metals and Minerals Corp.*, 1 F.3d 365, 370 (5th Cir. 1993) (applying Texas law); *State Farm Fire & Cas. Co.* v. *S-S*, 858 S.W.2d 374, 377-78 n.2 (Tex. 1993). New York law (if relevant, *see supra* n. 8) is to the same effect. *Continental Cas. Co.* v. *Rapid-American Corp.*, 609 N.E.2d 506, 510 (N.Y. 1993) ("[a] person may engage in behavior that involves a calculated risk without expecting that an accident will occur — in fact, people often seek insurance for just such circumstance."); *Allstate Ins. Co.* v. *Zuk*, 574 N.E.2d 1035, 1036 (N.Y. 1991) (behavior that may be reckless for criminal responsibility purposes does not necessarily mean that the insured reasonably expected the accident to result). Other states adopt the same rule. *See, e.g., Lumbermens Mut. Cas. Co.* v. *S-W Industries, Inc.*, 39 F.3d 1324 (6th Cir. 1994) (allowing insurance coverage action by insured despite prior jury finding that insured had committed intentional tort by engaging in conduct in face of risk that harm was substantially certain to occur) (applying Ohio law).

[10] The Second Circuit found that *Orient* was "equivocal" on the issue of whether reckless conduct was entitled to insurance coverage. If the Second Circuit were correct, there would be no material differences between the state and federal rules — for the simple reason that there would be no federal rule to differ from the state rule. Exxon submits that *Orient* is unequivocal and that the Second

test it is clear that state law would be applicable to Exxon's dispute herein. Such a conflict between the Second and Fifth circuits requires resolution by this Court.

Circuit's decision misinterprets and directly conflicts with that unambiguous holding. In *Orient*, a steamship captain and his father sued under a marine hull policy to recover for the loss of their ship. The insurers had denied coverage on the ground that the sinking had resulted from the insured's "misconduct." They offered evidence that "[b]efore the sailing of the vessel [the captain] had the reputation of being a 'drinking' man" and his father "was informed" of that fact. *Orient*, 123 U.S. at 69. Although the captain knew that the ship's engine had earlier been shut down for repairs, he left the dock without checking on the availability of steam. The ship, having no power, was carried by river currents over a falls and sank. In affirming the judgment in favor of the policyholders, this Court held that not even "gross negligence" on the part of the insured was a defense to coverage and that "the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy." *Id.* at 73.

The trial judge, however, had instructed the jury that the insured was not entitled to coverage if the captain had "designedly or recklessly exposed the vessel to the dangers of navigation at the falls." *Id.* at 72. This Court found that charge to be, in effect, harmless error. Because of the insurance company's good fortune in obtaining a charge that would have precluded coverage for "reckless conduct" — and still having lost — the *Orient* court observed that the insurers could not "rightfully complain." *Id.* Justice Harlan's statement in *Orient* that "[w]e do not perceive anything in these instructions of which the insurance company can rightfully complain," *id.* at 72, is a direct reference to the insured's argument that "... error (if there be any) was in adopting a rule too favorable to the Insurance company, in relieving it, for even if the Captain had been 'reckless' in exposing the vessel to the danger of navigation — it would not have released the Insurers." Brief of Defendants In Error at 7, *Orient Mut. Ins. Co.* v. *Adams*, No. 220, October Term 1886 (filed April 1887). The Court clarified the conduct for which the insured was entitled to coverage: misconduct short of "fraud or design."

In addition, four other circuits have adopted different tests from that of the Second Circuit to determine the application of *Wilburn Boat*. The Ninth Circuit has held that "state law will control the interpretation of a marine insurance policy only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice." *Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506 (9th Cir. 1984). Recently, the Ninth Circuit followed *Wilburn Boat* to apply California state insurance law against a group of Lloyd's underwriters. The court declared:

> "[i]t has been authoritatively recognized that, just as Congress has abstained from regulating insurance, so should the federal courts."

Bank of San Pedro v. Forbes Westar, Inc., No. 93-55979, 1995 WL 235265 at *1 (9th Cir. Apr. 24, 1995).

In the Eighth Circuit, "[f]ederal admiralty law governs the interpretation of . . . marine insurance policies, unless no established federal admiralty law exists, in which case state law applies." *Cargill, Inc.* v. *Commercial Union Ins. Co.*, 889 F.2d 174, 178 (8th Cir. 1989) (where the [federal] courts take differing positions on the meaning of "other insurance" clauses, no "established federal admiralty rule exists" and the court is obligated to follow applicable state law).

The Eleventh Circuit has focused on "whether there is an admiralty principle with which [the] state law conflicts, and, if there is none, whether an admiralty rule should be fashioned that covers the matter in issue." *Steelmet, Inc.* v. *Caribe Towing Corp.*, 779 F.2d 1485, 1489-90 (11th Cir. 1986).

The First Circuit appears to engage in an analysis similar to that of the Eighth Circuit. *Pace* v. *Ins. Co. of North America*, 838 F.2d 572, 579 (1st Cir. 1988) ("[n]o admiralty rule or precedent conflicting with the Rhode Island action

against an insurer for its bad faith refusal to pay claims has been called to our attention.").

None of these circuits would have looked to federal law when there was neither federal precedent nor a need to fashion a federal rule. The Second Circuit's holding that a marine insurance question of "first impression" must be answered by federal maritime law — a formulation that no circuit has yet adopted and one that undermines *Wilburn Boat* altogether — is the greatest inroad into *Wilburn Boat* in the last 40 years and a serious derogation from the principle that state law generally governs insurance disputes.

C. Resolving the Intercircuit Conflict on the Proper Application of the *Wilburn Boat* Decision Is Important to the Marine Insurance Industry.

In *Wilburn Boat*, this Court recognized the central role of the states in the regulation of marine insurance under the federal system. It is thus inevitable that different state laws may govern marine insurance disputes, depending upon which state has the greater substantial and legitimate interest in having its law apply to any particular dispute. By leaving the holding and consequences of *Wilburn Boat* undisturbed, Congress has authorized such a result. Nevertheless, the result in a particular insurance dispute should not depend on the circuit in which an action happens to be filed. Rather, there should be clear and predictable choice-of-law rules, applied uniformly nationwide, in order to enable the system to work fairly and effectively.

This case clearly illustrates the problems that may exist when there is an intercircuit conflict on the proper choice-of-law rules. If Exxon had filed its action in federal district court in Texas, the court would have applied the Fifth Circuit's three-part test and held that state law supplies the

rule of decision on all of the important issues. (*See* pages 12-13 *supra*.) The district courts in New York, however, will now be required to apply the Second Circuit's decision in this case and hold that federal law must be fashioned to govern marine insurance questions of first impression. This inconsistency is an invitation to forum-shopping, as persons seeking to evade the application of some state's law have an incentive to commence actions within the Second Circuit, while those favoring the application of state law now have every incentive to bring actions within the Fifth Circuit.

The *Wilburn Boat* regime is not only consistent with the allocation of authority between state and federal governments, it is also fair and effective when the lower courts apply the *Wilburn Boat* presumption uniformly and predictably. However, when the choice-of-law rules under *Wilburn Boat* vary among circuits, parties on each side of insurance transactions are unable to predict the law governing their disputes. This is clearly undesirable for marine insureds and their insurers.

This Court should resolve the intercircuit conflict on the choice-of-law question under *Wilburn Boat* and provide lower courts the guidance they need to answer the preliminary questions that arise in virtually every marine insurance case.

II.

The Second Circuit, in Conflict with Other Courts of Appeals, Has Erred in Applying the *Colorado River—Moses H. Cone* Abstention Analysis to a Case Under the Declaratory Judgment Act.

This case involves a first-filed state court action, commenced in the insured's home state, and a subsequent declaratory judgment action designed solely for forum shopping. The Second Circuit was informed that a trial date of January 16, 1996 had been set in the state court. The Second Circuit nevertheless required duplicative proceedings in the federal court to go forward.

Both the District Court and the Second Circuit applied this Court's statement in *Colorado River* that, absent "exceptional circumstances," federal courts have a "virtually unflagging obligation" to exercise jurisdiction. Neither *Colorado River* nor *Moses H. Cone* involved a declaratory judgment action. By contrast, the Declaratory Judgment Act clearly places "no compulsion" upon a federal court to exercise its discretion to grant declaratory relief where there is a pending state court action between the same parties over the same issue. *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942). Rather, the Act states that a district court "may" grant declaratory relief in a case involving an "actual controversy." *See* 28 U.S.C. § 2201(a).

When a federal court recognizes the existence of federal jurisdiction in a declaratory judgment action but declines to exercise that jurisdiction, the standard governing the district court's discretion should be that of the Act — as applied by

this Court in *Brillhart* — and not the "exceptional circumstances" test of *Colorado River* and *Moses H. Cone*. In the present case, the District Court clearly and correctly decided that the danger of "piecemeal litigation" justified its exercise of discretion to dismiss the declaratory suit so that the state law insurance dispute could proceed in the pending Texas Action. Under *Brillhart*, that is a sufficient reason to deny declaratory relief.[11]

The Second, Seventh and Eighth Circuits have applied the *Colorado River* test to determine whether a federal court should exercise its discretion to issue declaratory relief where there is a substantively identical action between the parties pending in state court. *See BASF Corp. v. Symington*, No. 94-2340, 1995 WL 109014 at *3-4 (8th Cir. Mar. 16, 1995); *Lumbermen's Mut. Cas. Co.* v. *Connecticut Bank & Trust Co.*, 806 F.2d 411 (2d Cir. 1986); *Board of Education* v. *Bosworth*, 713 F.2d 1316 (7th Cir. 1983). By contrast, the Third, Fourth, Fifth, and Ninth Circuits have applied *Brillhart* rather than *Colorado River*. *See Terra Nova Ins. Co.* v. *900 Bar, Inc.*, 887 F.2d 1213, 1223 (3d Cir. 1989); *Mitcheson* v. *Harris*, 955 F.2d 235, 237-238 (4th Cir. 1992); *Granite State Ins. Co.* v. *Tandy Corp.*, 986 F.2d 94, 96 (5th Cir. 1992), *cert. dismissed*, 113 S. Ct. 1836 (1993);

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[11] Exxon argued in the District Court that the *Brillhart* standard should govern and that the court should deny declaratory relief to the respondents. Noting the conflict in the circuits concerning the applicable test, the District Court held that it was bound by the Second Circuit's determination in *Lumbermen's Mut. Cas. Co.* v. *Connecticut Bank & Trust Co.*, 806 F.2d 411 (2d Cir. 1986), that *Colorado River* rather than *Brillhart* applies, but that even under the stricter *Colorado River* standard, abstention was proper. (B4-B5). On appeal, cognizant of the Second Circuit's binding precedent in *Lumbermen's*, appellee Exxon identified the circuit split but argued that, even under the stricter *Colorado River* analysis applicable in the Second Circuit, the District Court correctly gave precedence to the Texas Action.

Continental Cas. Co. v. *Robsac*, 947 F.2d 1367, 1369 (9th Cir. 1991).

In *Wilton* v. *Seven Falls Co.*, No. 94-562 (oral argument heard March 27, 1995), this Court is addressing whether *Colorado River* or *Brillhart* applies to cases brought under the Act where there is a state court action pending between the parties on the same issue.

Between oral argument and decision in the court below, Exxon informed the Second Circuit that this Court had granted certiorari in *Wilton*. In its opinion, the Second Circuit nevertheless distinguished *Wilton* on the ground that here "federal law supplies a rule of decision," whereas *Wilton* "involved state law only." (A8, footnote). Even assuming that the Second Circuit correctly found that federal admiralty law, not state law, applies to the insurance coverage questions presented, there is no reason why, in the event of an affirmance in *Wilton*, the reasoning in *Wilton* would be inapplicable. State courts are competent to resolve federal admiralty law issues, and the Second Circuit provided no support for its statement that federal law issues of "first impression" "all but demand" resolution in the federal courts. Indeed, because state courts have concurrent jurisdiction over suits in admiralty pursuant to the "saving to suitors" clause of 28 U.S.C. § 1333(1), Congress explicitly has determined that such issues should be resolved by the state courts if the plaintiff chooses to bring suit there.

In *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354 (1959), this Court found that application of the general maritime law did not provide a basis for federal question jurisdiction. Referring to the "savings to suitors clause," the Court stressed the importance of preserving the state court

forum to resolve maritime disputes.[12] As Justice Frankfurter explained, "[b]y making maritime cases removable to the federal courts it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters — a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve." *Romero*, 358 U.S. at 372

The *Romero* court's recognition that maritime rights can — indeed, should — be enforced in the state courts is directly undermined by the Second Circuit's determination that admiralty issues of "first impression" "all but demand" a federal forum for resolution. If, under *Wilton*, an insurance dispute is better resolved in a pending state forum rather than a later-filed declaratory judgment action, the mere fact that the insurance question implicates maritime law is not a sufficient reason to adjudicate the dispute in federal court and effectively "remove" the dispute to the federal courts. But this is precisely the effect of the Second Circuit's decision.

At its core, the Second Circuit's decision constitutes a mistrust of a state court forum to resolve alleged "federal" admiralty issues. This is an inappropriate basis upon which to reverse the District Court's decision to abstain. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 150 (1988) (Texas courts "are presumed competent to resolve federal issues"); *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 15-16 (1987) (rejecting arguments that Texas courts could not protect litigants' federal rights); *Am. Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 518 (1955) (referring to "continuing evidence of confidence in the state courts" to enforce federal rights).

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[12] If general maritime law provided federal question jurisdiction, maritime cases would be freely removable — thus undermining the "savings to suitors" clause. Steven F. Friedell, 1 *Benedict on Admiralty* § 122 at 8-6 (6th ed. 1994).

Because the issue we raise here — whether *Colorado River* or *Brillhart* governs a federal court's discretion to entertain a declaratory judgment action — is currently pending in *Wilton*, the Court may wish to hold this petition until *Wilton* is decided, then dispose of it as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, New York
May 12, 1995

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit dated February 21, 1995

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 848 — August Term, 1994

(Argued: November 30, 1994

Decided: February 21, 1995)

Docket No. 94-7691

JOHN RICHARD LUDBROOKE YOUELL, an underwriter at Lloyd's London for himself and as a representative of those other Underwriters at Lloyd's London severally subscribing to certain Global Corporate Excess Insuring Agreements at issue and the following London Market Insurance Companies and other international Underwriting entities, also severally subscribing to the Insuring Agreements at issue, each on their own behalf and not for the other; *et al.*,

Plaintiffs-Appellants,

-v-

EXXON CORPORATION,

Defendant-Appellee.

Before:

MAHONEY, McLAUGHLIN, and HEANEY,[1]
Circuit Judges.

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[1] Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

The insurers for Exxon Corporation sued Exxon in the United States District Court for the Southern District of New York (Preska, *J.*) for a declaratory judgment that they did not have to reimburse Exxon for certain losses incurred from the wreck of the *Exxon Valdez*. The district court dismissed the suit under the *Colorado River* abstention doctrine because a mirror-image lawsuit, filed by Exxon, was pending in Texas state court.

REVERSED.

WILLIAM F. CAVANAUGH, JR., New York, NY (Harold R. Tyler, Jr., Lisa C. Cohen, Roosevelt N. Nesmith, Patterson, Belknap, Webb & Tyler, New York, NY; Richard W. Palmer, Frank P. DiGiulio, H. Coleman Switkay, Palmer Biezup & Henderson, Philadelphia, PA, of counsel), *for Plaintiffs-Appellants*.

JAMES H. CARTER, New York, NY (Tariq Mundiya, Steven S. Drachman, Sullivan & Cromwell, New York, NY; Robert N. Sayler, Brice M. Clagett, Mitchell F. Dolin, Covington & Burling, Washington, DC; Charles A. Beach, Irving, TX, of counsel), *for Defendant-Appellee*.

McLAUGHLIN, *Circuit Judge*:

Exxon Corporation sued its insurers (the "Underwriters") in a Texas state court, seeking reimbursement for losses and liabilities arising from the tragic grounding of its oil tanker, the *Exxon Valdez*. Though Exxon was headquartered in New

York when the *Valdez* ran aground, it relocated to Texas before filing suit. The several Underwriters, with their various headquarters around the globe, doubtless feared the home-court advantage that Texas would give Exxon. So, the Underwriters filed their own suit against Exxon in the United States District Court for the Southern District of New York (Loretta A. Preska, *Judge*), seeking a declaration that they were not liable on the insurance policies.

Invoking the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), the district court dismissed the Underwriters' action. The district court concluded that abstention was appropriate because (1) a parallel action was already proceeding in Texas state court, (2) states have a strong interest in insurance regulation, and (3) the case was controlled predominantly by state law.

On appeal, the Underwriters argue that *Colorado River* abstention was improper. Because this marine insurance dispute presents a federal question of first impression, and because the dual proceedings will cause no serious adverse consequences, we agree with the Underwriters, and reverse the district court's dismissal of their complaint.

BACKGROUND

The Underwriters comprise a group of more than 100 underwriters and insurance companies, headquartered in London, New York, Scandinavia, Japan, and elsewhere. All of them subscribed to a series of Global Corporate Excess insurance agreements (collectively, the "Agreement") with Exxon for the period from November 1988 through October 1989.

The Agreement insures Exxon and some of its subsidiaries against certain risks incurred during their worldwide activities. Specifically: Section I of the Agreement

covers all physical loss or damage to the insured's own property; Section IIIA covers marine liabilities, such as fines and penalties for pollution; Section IIIB covers nonmarine liabilities, such as damage claims by third parties. Both Sections I and IIIA broadly cover losses that are "the unforeseen result of an intentional act." The Agreement also requires arbitration of claims arising under Section IIIB.

One of the subsidiaries covered by the Agreement owned the ill-starred *Exxon Valdez* oil tanker. In March 1989, the *Valdez* ran aground in a rocky shoal 25 miles south of Valdez, Alaska, and spilled 10.8 million gallons of oil into Prince William Sound. The master of the *Valdez* was Captain Joseph Hazelwood. The Underwriters allege that Hazelwood was drunk when the *Valdez* grounded, and that Exxon knew he was an alcoholic.

Exxon incurred colossal liabilities from the oil spill. Besides the damaged tanker and irreclaimable oil, Exxon faced a host of federal environmental violation charges, as well as federal and state civil claims for clean-up costs and other damages. In addition, private individuals such as commercial fishermen sued Exxon to recover for damage caused by the oil. (As of this appeal, Exxon has resolved its disputes with most of these claimants.)

In April 1989, Exxon tried to recoup some of its massive losses. It sent the Underwriters notice of its loss, and sought reimbursement for the lost oil, clean-up costs, and various liabilities to third parties. Exxon's demand exceeded $ 2 billion. The Underwriters denied coverage, claiming that the disaster was caused by Exxon's own misconduct, *viz.*, placing a known alcoholic at the helm of the *Valdez*.

When negotiations collapsed, Exxon sued the Underwriters in Texas state court. Exxon's complaint alleged that the Underwriters had breached the Agreement and the covenant of good faith and fair dealing, and had also violated

Texas insurance law. The complaint conceded that one of its insurers, Qatar National Reinsurance Company, is an instrumentality of a foreign state, and, as such, is not subject to suit in a state court. Accordingly, the complaint "release[d] and waive[d] all claims [Exxon] may have against [Qatar National] arising out of or in any way related to the [Agreement]."

Disquieted with the Texas forum, the Underwriters twice tried to remove the action to a federal court in Texas. Both attempts failed. The Underwriters also filed the present lawsuit in the United States District Court for the Southern District of New York.

Qatar National joined as a co-plaintiff; but four of the Underwriters had become insolvent (the "insolvent insurers"), and they did not join. The Underwriters' complaint sought a declaratory judgment that they were not liable to Exxon. Further, citing the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, the complaint alleged that Exxon's Section IIIB claims were subject to mandatory arbitration. Exxon agreed thereafter to arbitrate the Section IIIB claims, rendering the Underwriters' Federal Arbitration Act argument moot. Thus, only the Section I and Section IIIA claims remain in the lawsuit, both raising the same question: what insurance coverage is there for "the unforeseen result of an intentional act"?

Exxon moved to dismiss the Underwriters' complaint, claiming that the federal court lacked subject-matter jurisdiction, and, alternatively, that it should defer to the Texas state court proceeding. The district court rejected Exxon's challenge to federal jurisdiction, holding that the dispute sounded in admiralty. Nevertheless, the court concluded that exceptional circumstances existed to warrant dismissal under *Colorado River*. Accordingly, it granted Exxon's motion, and dismissed the complaint. *See Youell v. Exxon Corp.*, 1994 WL 376068 (S.D.N.Y. July 19, 1994).

As counseled by *Colorado River*, and the subsequent case *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), the district court examined: whether either court had obtained jurisdiction over a *res*; the relative convenience of the fora; the order in which the actions were filed; the desirability of avoiding piecemeal litigation; the source of controlling law; and the state court's ability to protect the federal plaintiff's interests. Finding that the suit did not involve a *res*, and that the two fora were equally convenient, the district court eliminated these two factors. The court also noted that the Texas action was filed first, and had progressed slightly further than the federal action.

The district court then found that piecemeal litigation was particularly undesirable under the circumstances because it could lead to conflicting interpretations of the same insurance policy. The court also held that Texas law predominantly supplied the rules of decision for the dispute because states have a strong policy interest in regulating insurance and because no applicable admiralty rule existed. Finally, the district court determined that the Texas court was fully capable of protecting the Underwriters' interests.

Balancing the six factors, the district court concluded that abstention was proper under *Colorado River* and *Moses H. Cone*, and dismissed the complaint. The Underwriters now appeal. We reverse.

DISCUSSION

Abstention jurisprudence begins with the principle that federal courts have a "virtually unflagging obligation" to exercise jurisdiction over all cases properly before them. *Colorado River*, 424 U.S. at 817-18. Only under "exceptional circumstances" relating to federal-state comity may a court eschew this duty, and leave the parties to fend for themselves in state court. *Id.* at 813.

There are four "extraordinary and narrow exception[s]" to a federal court's duty to exercise jurisdiction. *Id.* A federal court may decline to hear a case: (1) that poses a federal constitutional issue that may be mooted or altered by a state court ruling on state law, *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941); (2) involving complex questions of state law that bear on important state policy issues, *see Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); (3) that was filed to enjoin state court proceedings, *see, e.g., Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) (attempt to enjoin state criminal proceedings); or (4) when duplicative state court proceedings are pending, and exceptional "reasons of wise judicial administration" counsel dismissal, *Colorado River*, 424 U.S. at 817-18.

The *Pullman* abstention doctrine prevents federal courts from interpreting the Constitution where the case can be decided on alternative grounds; *Burford*, and *Younger* extricate federal courts from situations where the assertion of jurisdiction would intrude into the state courts' proper domain. Duplicative proceedings do not necessarily implicate these weighty concerns, and, thus, only "exceptional" circumstances permit *Colorado River* abstention. *Id.* at 817-18.

Whether *Colorado River* abstention is justified turns on a balancing of six factors: (1) whether either the state or federal court has assumed jurisdiction over a *res*; (2) the relative inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the actions were filed; (5) whether state or federal law provides the rule of decision; and (6) whether the state action will protect the federal plaintiffs' rights. *De Cisneros v. Younger*, 871 F.2d 305, 307 (2d Cir. 1989). *See Moses H. Cone*, 460 U.S. at 23, 26 (1983) (announcing factors five and six); *Colorado River*, 424 U.S. at 818 (announcing factors one through four). Not all factors are created equal. A court will accord greater weight to those factors that bear more

significantly on the case, and should thumb the scale in favor of exercising jurisdiction. *See Moses H. Cone*, 460 U.S. at 16.

We review the decision to abstain for abuse of discretion, but scrutinize the legal issues underlying that decision *de novo*. *See Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46, 48 (2d Cir.), *cert. denied*, 130 L. Ed. 2d 23, 115 S. Ct. 67 (1994).[2]

Here, one of the *Colorado River-Moses H. Cone* factors heavily tilts against abstention, two disfavor it, and three weakly support it. We will review these factors in the order of their importance.

A. *The Source of the Rule of Decision*

Of the six *Colorado River-Moses H. Cone* factors, the fifth, the source of the rule of decision, is the most prominent here because an unresolved question of federal admiralty law will profoundly affect whether the Underwriters are liable to Exxon.

It is indisputable that the presence of federal questions weighs heavily against abstention. *See Moses H. Cone*, 460

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[2] The Supreme Court recently granted certiorari to hear argument that courts should review abstention decisions *de novo*. *See* Supreme Court Brief for Petitioner, *Wilton v. Seven Falls Co.*, 41 F.3d 934 (5th Cir.), *cert. granted*, 115 S. Ct. 571 (1994) (brief available as 1995 WL 13178). Since we find that the district court abused its discretion, *Wilton*'s decision on this issue will not change our ruling.

We also note that our case is fundamentally distinct from *Wilton* because, as discussed below, federal law supplies a rule of decision. *Wilton*, in contrast, involved state law only. *See id.*

U.S. at 26 ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender."); *Colorado River*, 424 U.S. at 815 n.21 ("[T]he presence of a federal basis for jurisdiction may raise the level of justification needed for abstention."); *DeCisneros*, 871 F.2d at 308 ("When the applicable substantive law is federal, abstention is disfavored."). And, since the lawsuit here concerns a marine insurance policy, it falls within the embrace of federal admiralty law. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 99 L. Ed. 337, 75 S. Ct. 368 (1955).

That admiralty jurisdiction exists does not automatically assure that the applicable law will be federal, however. Unlike other areas of admiralty law, Congress has not chosen to legislate with regard to marine insurance. *See id.* at 313-14. As a result of this lacuna, marine insurance policies are governed by state insurance regulations, unless the federal courts have fashioned an admiralty rule on point, or unless a need for such a federal rule exists. *See id.* at 314; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 98 L. Ed. 143, 74 S. Ct. 202 (1953) (where federal law provides a defense in an admiralty suit, it controls over state law); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961) ("The application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented."). We must therefore determine whether the federal courts have fashioned an applicable admiralty rule, and if not, whether one is necessary.

The plaintiffs suggest several rules that, they claim, provide defenses to marine insurance liability—among them, the rule that all-risk policies in marine insurance contracts only cover losses caused by fortuitous events (the "fortuity rule"). They argue that the fortuity rule is an admiralty rule, and that it exempts a marine insurer from having to cover losses caused by the insured's recklessness. Thus, the plaintiffs argue, if they can prove that Exxon recklessly allowed a known alcoholic to pilot the Valdez and that this recklessness caused the grounding, the fortuity rule relieves them of liability.

Exxon, for its part, recognizes the fortuity rule but disputes that the rule is federal, claiming instead that it arises under state law. Exxon also argues that, in any event, losses caused by recklessness are still fortuitous, and are therefore covered.

As an initial matter, we agree with plaintiffs that the fortuity rule is indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over a hundred years. *See Orient Mut. Ins. Co. v. Adams*, 123 U.S. 67, 31 L. Ed. 63, 8 S. Ct. 68 (1887). In so doing, these courts have predominantly looked to federal law as precedent. *See, e.g., Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 431 (5th Cir. 1980) (relying on Second, Fifth, and Ninth Circuit cases); *Atlantic Lines Ltd. v. American Motorists Ins. Co.*, 547 F.2d 11, 12-13 (2d Cir. 1976) (relying on various federal district and circuit court decisions); *Western Assur. Co of Toronto v. Shaw*, 11 F.2d 495, 496 (3d Cir.) (relying on federal precedent), *cert. denied*, 273 U.S. 698, 71 L. Ed. 846, 47 S. Ct. 93 (1926). And, to the extent that admiralty courts have looked to other sources, they have relied on British as much as state case law authority. *See, e.g., Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340-41 (9th Cir. 1988) (looking to British case law); *Goodman v. Fireman's Fund Ins. Co.*, 600 F.2d 1040, 1042 (4th Cir. 1979) (relying on cases from Great Britain, North Carolina, and federal courts). That admiralty courts do not look exclusively to state law on the issue of fortuity indicates to us that the rule must have an independent existence in federal maritime law.

Less clear, however, is how the fortuity rule regards losses caused by the insured's own recklessness. The fortuity rule excludes from coverage losses that arise from inherent defects, wear and tear, or from the insured's wilful misconduct; losses that arise from acts of nature, or the insured's negligence, are covered. *See Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 307 (2d Cir. 1987); Grant

Gilmore, Charles L. Black Jr., *The Law of Admiralty* § 2-9, at 72 (2d ed. 1975) ("What is covered is not any loss that may happen on the sea, but fortuitous losses occurring through extraordinary action of the elements at sea, or any accident or mishap in navigation.") (emphasis omitted). While negligent losses are fortuitous, and wilful ones are not, admiralty courts have yet to assign losses caused by the insured's own reckless conduct to either camp.

The concept of recklessness does not lend itself to easy characterization as either negligent or wilful conduct. Recklessness implies that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 213 (5th ed. 1984) (citations omitted). As such, recklessness falls somewhere "between intent to do harm, which . . . includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence." *Id.* at 212 (citation omitted). In other words, recklessness lies in the mists between mere negligence and wilful misconduct.

The hallmark fortuity decision is *Orient Mutual Insurance Company v. Adams*, 123 U.S. 67, 31 L. Ed. 63, 8 S. Ct. 68 (1887). In *Orient*, the master, or captain, of a steamer failed to follow a "custom of the river," and, as a consequence, his vessel was carried over falls and dashed upon a pier. The master had obtained an insurance policy upon the vessel, and sued to recover upon it.

At trial, the district judge instructed the jury that the insurer of the vessel would not be liable for damages if the ship master "designedly or recklessly exposed" the vessel to danger. *See Orient*, 123 U.S. at 72. The judge added, however, that "the [insurer] is not relieved from liability by

showing that the loss was remotely ascribable to the negligence of the captain or the other officers or [employees]." *Id.* The jury found for the insured.

On appeal to the Supreme Court, the insurer argued that the district judge should have charged that losses caused by the master's "misconduct" were also outside the realm of fortuity. *Orient* rejected the insurer's argument, stating: "the court properly said, in effect, that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy." *Id.* at 73. *Orient* continued that "the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself." *Id.* (citation omitted). Thus, *Orient* concluded, the jury charge was proper.

We find that *Orient* is equivocal as to the precise issue of whether a marine insurer is liable under a policy for losses caused by an insured's recklessness. *See* 123 U.S. at 72-73. On one hand, as the Underwriters point out, *Orient* affirmed the district court's jury charge that the insurer is not liable for damages that occur because the master acted "designedly or recklessly." *Id.* On the other, as Exxon notes, *Orient* also stated the insurer is liable for all losses except those caused by the master's "fraud or design." *Id.* We cannot reconcile these two statements, for, at least, in modern legal parlance, "recklessness" is different from both fraud and design.

Admiralty cases after *Orient* similarly shed little light on the issue. For example, *Ingersoll* stated that an insurer is liable for "all losses which are fortuitous no matter what caused the loss, including the insured's negligence." *See* 829 F.2d at 307. *Ingersoll* also defined fortuity to exclude any loss caused by the insured's intentional misconduct. *See id.* Nowhere does *Ingersoll* explain what happens when the loss stems from the insured's conscious disregard of a known risk, however. Other admiralty cases discussing fortuity have likewise not addressed the point. *See, e.g., Zurich*, 838 F.2d at 340-41 (loss is fortuitous if it is "due to the sea"); *Morrison*, 632 F.2d at 431

(fortuitous losses are brought about by chance); *Goodman*, 600 F.2d at 1042 (losses caused by negligence are fortuitous; losses caused by intentional misconduct are not); *Atlantic*, 547 F.2d at 12 (mysterious loss of goods is fortuitous); *Western*, 11 F.2d at 496 (only losses caused by "abnormal causes and extraordinary occurrences" are covered by marine insurance policy).

It is clear, then, that whatever court adjudicates Exxon's insurance dispute with the Underwriters must decide, on first impression, whether losses caused by the insured's recklessness are fortuitous. This being an issue of admiralty law, a federal court should not shy away from it. Indeed, if the mere presence of a federal law issue is "a major consideration weighing against" abstention, *Moses H. Cone*, 460 U.S. at 26, *a fortiori*, a federal question of first impression must all but demand that the federal court hear the case.

B. *Undesirability of Piecemeal Litigation*

Obviously, if the federal court refuses to abstain, the inevitable result will be piecemeal litigation. Just as obviously, that result cannot command that the federal court abstain. Considerations of sound judicial administration require a pragmatic evaluation of the relative costs and benefits of permitting parallel litigation to proceed apace. *See Colorado River*, 424 U.S. at 819.

Apart from the expense of mounting separate lawsuits in New York and Texas, the major problem in pursuing parallel litigation is the risk of inconsistent determinations. *See DeCisneros*, 871 F.2d at 308. That risk is particularly acute in insurance disputes, where the possibility of inconsistent determinations may leave the insured with insufficient coverage. *See Lumbermens Mut. Cas. Co. v. The Connecticut Bank & Trust Co.*, 806 F.2d 411, 414-15 (2d Cir. 1986). This problem is largely dissipated, however, when it is recalled that a judgment by either a federal or a state court will ordinarily

be res judicata in the other. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567, 77 L. Ed. 2d 837, 103 S. Ct. 3201 (1983); *Milltex Indus. Corp. v. Jacquard Lace Co.*, 922 F.2d 164, 166 (2d Cir. 1991).

True, because they are not parties to both suits, res judicata may not apply to the four insolvent insurers or to Qatar National. These loose ends, although conceptually discomfiting, are of little practical significance. Exxon has no right to recover from Qatar National under the Agreement because Exxon has released Qatar National from liability. And, if the Underwriters should lose to Exxon, and seek contribution from Qatar National, they will have to bring suit in a federal court anyway. *See* U.S. Const. Art. III, § 2; 28 U.S.C. §§ 1332(a)(4), 1603(a) (federal courts have exclusive jurisdiction to hear suits against agencies of foreign governments). Thus, as far as Qatar National is concerned, the exercise of federal jurisdiction will not occasion additional unnecessary suits.

The four insolvent insurers are defendants in the Texas action, but have not joined the Underwriters as plaintiffs in the Southern District. If the Texas court enters judgment before the federal court does, that judgment will conclusively determine the insolvent insurers' liability by virtue of res judicata.

If, on the other hand, the federal court enters judgment first, the insolvent insurers would not appear to be bound by res judicata because they are not parties to the federal action. In theory, then, no matter which way the federal court ruled, Exxon will have to continue to litigate in Texas against the insolvent insurers.

As Exxon points out, this chain of events could lead to inconsistent interpretations of the Agreement, and, as Exxon reads *Lumbermens Mutual Casualty Company v. The*

Connecticut Bank & Trust Company, this supports abstention. *See* 806 F.2d at 414-15. We find *Lumbermens* distinguishable.

In *Lumbermens*, various insurance companies had issued liability insurance policies for Raymark Industries, an asbestos manufacturer, for different periods over a 42-year span. About 30,000 personal injury lawsuits were pending against Raymark, and the insurers disagreed as to whether, for coverage purposes, the injuries occurred on the date of exposure to asbestos or the date the injury manifested itself. Zurich Insurance, one of Raymark's primary insurers, sued Raymark and all other primary insurers in Illinois state court, for a declaration that asbestos injury occurs at the time of exposure, not the date the injury is discovered. All Raymark's excess insurers eventually joined the suit. *See Lumbermens*, 806 F.2d at 412-13.

A second-layer excess insurer, Lumbermens Mutual, had agreed to cover Raymark for liabilities in excess of Raymark's primary coverage (provided by Zurich) and first-layer excess coverage (provided by American Home Insurance). Lumbermens Mutual sued Raymark in federal court, raising solely the issue about the timing of injury. Zurich and American Home, however, were not parties to the federal suit. The district court stayed the federal proceeding in light of the state court action, and this Circuit affirmed, finding that *Colorado River* abstention was proper. *See id.* at 414-15.

Integral to *Lumbermens*'s holding was that inconsistent determinations by the two courts as to when asbestos injuries occur could leave Raymark without sufficient coverage. *See* 806 F.2d at 415. That is, if the federal court entered judgment first, and the state court followed with a contrary judgment, Raymark would be reimbursed by either Zurich and American Home *or* Lumbermens Mutual, but not all three. As a result, Raymark would be stranded without full coverage, even though it had contracted for full coverage. *Lumbermens* also noted that inconsistent judgments would render the "allocation of indemnity and defense costs and the handling and

administration of over 30,000 asbestos-related claims against Raymark absolutely impossible." *Id.*

Compared to *Lumbermens*, the possibility of inconsistent adjudications in our case pales to insignificance. First, Raymark's entitlement to full coverage was not in question in *Lumbermens*; the issue there was which insurers were liable for the coverage. Here, by contrast, the dispute centers on whether, under the Agreement, Exxon may recoup its losses at all. Thus, we do not face a situation where inconsistent adjudications may deprive Exxon of its due coverage. Second, the four insurers who are not federal plaintiffs are insolvent, and probably judgment-proof. *See, e.g., In re New York City Asbestos Litigation*, 151 Misc. 2d 1, 572 N.Y.S.2d 1006, 1010 (Sup. Ct. 1991) (noting that a defendant who is insolvent may be unable to contribute to a judgment), *modified on a different issue*, 593 N.Y.S.2d 43 (App. Div. 1st Dep't 1993). Third, inconsistent judgments will not complicate the administration of liability claims against Exxon because these claims will have already been resolved. Finally, we note that the four insolvent insurers constitute a minuscule fraction of the Underwriters, and are likely responsible for a trifling percentage of the total coverage provided by the Agreement. Given these important differences, the risk of inconsistent judgments here is inconsequential.

Finally, and most significantly, we note that here, unlike *Lumbermens*, resolution of the dispute hinges upon a novel determination of federal law. *See Lumbermens*, 806 F.2d at 415 ("state law supplies the rule of decision on the merits"). On balance, the possible annoyance that piecemeal litigation may cause here hardly offsets the commanding presence of a federal question of first impression.

C. *The Remaining Colorado River-Moses Cone Factors*

Colorado River requires us to look at whether either the federal or state court has obtained jurisdiction over a res, and whether the federal forum is more or less convenient than the state. *Colorado River*, 424 U.S. at 818. Here, the district court determined that these factors had no bearing on the abstention analysis because no *res* was involved, and because New York and Texas were equally convenient fora.

While the district court's factual findings on these two points were sound, the court erred by concluding that they were totally neutral on the abstention question. When the dispute lacks a *res* and the federal forum is just as convenient as the state, these two factors *favor* retention of the case in federal court. *See DeCisneros*, 871 F.2d at 307; *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 327-28 (2d Cir. 1986).

The order in which the actions were filed must also be considered. *Colorado River*, 424 U.S. at 818. This factor requires consideration of "how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. at 21-22. While neither action has progressed very far, some discovery has occurred in the Texas action. Also, Exxon expects to schedule a trial date in Texas for as early as the end of 1995; it is unclear when a federal trial could be held. The Texas action being further along, this factor slightly favors abstention.

The final *Colorado River-Moses H. Cone* factor looks at the capability of the state forum to safeguard the federal plaintiffs' rights. *Moses H. Cone*, 460 U.S. at 26. The Underwriters have offered no reason for us to doubt the Texas court's ability to protect their rights. This factor somewhat favors abstention as well.

D. *The Balancing*

In balancing the six *Colorado River-Moses H. Cone* factors, we find that the federal law issue is truly a brooding omnipresence. As discussed, a major determinant of the Underwriters' liability to Exxon will be whether maritime losses caused by an insured's recklessness are fortuitous. This is a novel issue of federal admiralty law, and a federal court should decide it. In addition, this dispute lacks a *res*, and the fora are equally convenient. While the other three factors tilt towards abstention, they do so only tepidly. Accordingly, we see no exceptional circumstances here, and hold that the district court abused its discretion by abstaining.

While we loathe wasting judicial resources, it would be worse to cede federal review of an issue of federal law merely because Exxon won the race to judgment in state court. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 14.2, at 668 (1989) ("[T]he Supreme Court rightly has refused to allow those who prefer to litigate in state court to have the power to prevent federal court review simply by filing a suit in state court."). On balance, we choose the lesser evil.

CONCLUSION

Unlike *Pullman*, *Burford*, and *Younger* abstention, which implicate lofty notions of constitutionalism, the decision to abstain under *Colorado River* is driven by the more mundane problems of judicial efficiency. Accordingly, in "the absence of weightier considerations of constitutional adjudication and state-federal relations," the federal action should generally continue. *Colorado River*, 424 U.S. at 818.

We reverse the district court's judgment of dismissal. REVERSED.

APPENDIX B

Amended Memorandum Opinion and Order of the United States District Court for the Southern District of New York dated July 18, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN RICHARD LUDBROOKE YOUELL, et al.,

Plaintiff(s),

-against-

EXXON CORPORATION,

Defendant(s).

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93 Civ. 6093 (LAP)

LORETTA A. PRESKA, District Judge:

This is an action by the Underwriters of Exxon Corporation's ("Exxon") Global Corporate Excess ("GCE") Coverage for a declaratory judgment that the GCE Coverage does not cover certain losses incurred by Exxon as a result of the grounding of the Exxon Valdez. The Underwriters also ask the Court to segregate issues falling within the policy's mandatory arbitration clause and order such issues to arbitration. Presently considered is Exxon's motion to dismiss the action for lack of subject matter jurisdiction, or, alternatively, to dismiss or stay the action in favor of pending state court proceedings.

BACKGROUND

On March 24, 1989, the Exxon Valdez ran aground off the coast of Alaska. Approximately 258,000 barrels of crude oil escaped into the water and eventually washed onto adjacent

shorelines. As a result of the accident, Exxon incurred expenses and liabilities for, inter alia, cargo loss, clean up, and third-party claims.

By letter dated April 4, 1989, Exxon purported to give the Underwriters certain notice of loss arising out of the Exxon Valdez incident. On October 30, 1990, the Underwriters formally denied Exxon's claims. Nevertheless, over the next three years Exxon and the Underwriters continued negotiating and engaged in non-binding mediation. Unfortunately, they were unable to resolve their differences, and on August 4, 1993, Exxon filed suit against the Underwriters in the District Court of Harris County, Texas ("the Texas action"). Exxon asserted claims for breach of contract, breach of the Underwriters' covenant of good faith and fair dealing, and violations of the Texas Insurance Code, based on the Underwriters' refusal to pay Exxon's claims. The Underwriters removed the Texas action to federal court and filed a motion to transfer the action to New York. On Exxon's motion, however, the federal court remanded the action back to the Texas court, where it remains pending.

On the same day the Underwriters filed their removal petition in the Texas action, they also instituted the present suit in this Court. The 30-count complaint is essentially a mirror image of Exxon's complaint in the Texas action. The Underwriters seek various declaratory judgments to the effect that Exxon's Exxon Valdez-related losses are not within the GCE Coverage and that the Underwriters have at all times acted in good faith with respect to Exxon. The sole significant difference between the complaint in this action and the Texas complaint is Count XXX, which requests the Court to determine which issues in this dispute fall within Section IIIB's mandatory arbitration clause and to order those issues to arbitration. Exxon's complaint in the Texas action makes no reference to arbitration.

In lieu of answering the Underwriters' complaint, Exxon interposed the present motion to dismiss for lack of subject matter jurisdiction or, in the alternative, to dismiss or stay the complaint in deference to the Texas action. For the reasons stated below, the motion is granted and the case is dismissed.

DISCUSSION

A. *Subject Matter Jurisdiction*

In their complaint, the Underwriters assert three distinct bases of subject matter jurisdiction: 28 U.S.C. § 1333 (admiralty and maritime), 28 U.S.C. 1331 (federal question), and 9 U.S.C. § 203 (jurisdiction in aid of international arbitration agreements). The Court need not examine the latter two bases, because insofar as this case involves marine insurance, it falls within the admiralty jurisdiction. *E.g.*, *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 20 L. Ed. 90 (1870). Exxon, in fact, concedes as much, arguing only that the Court should decline to exercise its admiralty jurisdiction, not that such jurisdiction does not exist.[1] Accordingly, the Court will treat the motion as one for abstention rather than dismissal for lack of jurisdiction.

B. *Abstention*

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[1] Almost halfheartedly, Exxon does argue that declaratory relief is unavailable in maritime actions. Numerous cases in this circuit, however, belie that proposition. *See, e.g.*, *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); *Greenwich Marine, Inc. v. S.S. Alexandra*, 339 F.2d 901, 907 (2d Cir. 1965); *Commercial Union Insurance Co. v. Horne*, 787 F. Supp. 337 (S.D.N.Y. 1992).

On the issue of abstention, the initial question is what standard the Court should apply in deciding whether to decline to exercise its jurisdiction. Both parties agree that none of the traditional categories of abstention -- *Pullman*, *Younger*, and *Burford* -- apply here. Exxon urges the Court to apply the *Brillhart* doctrine, which provides that "when a declaratory judgment is requested, the district court is 'under no compulsion to exercise that jurisdiction' if the controversy might be settled more expeditiously in state court." Erwin Chemerinsky, *Federal Jurisdiction* 670 (1989) (quoting *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 494, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942)). The Underwriters, on the other hand, argue that *Brillhart* has been superseded by *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), where the Supreme Court established comprehensive guidelines for abstention on the grounds of parallel state proceedings.

Among the Circuits, there is conflict on the issue of whether the relatively lax abstention standard announced in *Brillhart* for declaratory judgment actions survived *Colorado River*'s enunciation of a stricter test for general application. Compare *Continental Cas. Co. v. Robsac*, 947 F.2d 1367 (9th Cir. 1991) (applying *Brillhart*) with *Board of Education v. Bosworth*, 713 F.2d 1316 (7th Cir. 1983) (applying *Colorado River*). In this Circuit, however, the answer is clear: a court asked to abstain from a declaratory judgment action on the basis of parallel state court proceedings must apply the doctrine of *Colorado River*. *See Lumbermens Mutual Cas. Co. v. Connecticut Bank & Trust Co.*, 806 F.2d 411, 413 (2d Cir. 1986).

Colorado River Abstention

Generally, "where . . . a federal court properly has subject matter jurisdiction, it has a 'virtually unflagging obligation' to exercise that jurisdiction, even if an action

concerning the same matter is pending in state court." *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 327 (2d Cir. 1986) (quoting *Colorado River*, 424 U.S. at 817-818). In exceptional circumstances, however, where justified by considerations of judicial economy and comprehensive disposition of litigation, a federal court may decline to exercise its jurisdiction in deference to pending state court proceedings. *Colorado River*, 424 U.S. at 817-819. This exception is a narrow one, and the party arguing for abstention bears a heavy burden of persuasion. *Bank of N.Y. v. Bin Saud*, 628 F. Supp. 474, 476 (S.D.N.Y. 1986). "Only the clearest of justifications will warrant dismissal" or stay of the federal action. *Colorado River*, 424 U.S. at 819; *Bethlehem Contracting*, 800 F.2d at 327 n. 1 (noting that the abstention analysis is the same whether a party seeks stay or dismissal).

The Supreme Court has identified six factors a district court should weigh in considering whether a defendant has established "exceptional circumstances" warranting abstention: (1) Whether either the federal or state court has assumed jurisdiction over any "res" or property; (2) inconvenience of the federal forum; (3) avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether state or federal law supplies the rule of decision; and (6) whether the state court proceeding will adequately protect the rights of the parties. *Id.* at 327 (citing *Colorado River*, 824 U.S. at 818, and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23-27, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). Consideration of these elements is within the sound discretion of the district court. *Moses H. Cone*, 460 U.S. at 19. However, a court is not to use the factors as a checklist, tallying those for and against abstention. Rather, the Court must determine which factors are important in a given case and then decide whether, on balance, they make out exceptional circumstances supporting abstention. *Id.* at 16.

Colorado River Applied

The first *Colorado River* factor, jurisdiction over a "*res*," is irrelevant here. Neither this Court nor the Texas court has assumed jurisdiction over any *res*.

The second factor, inconvenience of the federal forum, while not irrelevant, is similarly of no use to Exxon. As a large multinational corporation, Exxon is presumably capable of bearing the costs of litigating in New York. It argues that witnesses and evidence are located in Texas, and that the defendants are subject to jurisdiction there. The Underwriters, however, point out that witnesses and evidence are also located near New York. And, of course, the defendants in the Texas action are all present in this action as plaintiffs. Overall, the balance of inconvenience does not tip markedly in either direction. Thus, the second factor contributes little, if anything, toward establishing exceptional circumstances.

Skipping to the fourth factor, the order in which jurisdiction was obtained, the Court notes that Exxon filed the Texas action about a month before the Underwriters instituted this suit. Yet, evaluation of this factor requires more than a mere comparison of filing dates. In considering when the competing fora established jurisdiction, the Court's purpose is to see if one action or the other has progressed to such a degree that it would be particularly wasteful to proceed concurrently elsewhere. *Moses H. Cone*, 460 U.S. at 21. In the instant matter, neither this action nor the Texas action has advanced very far. In this action, there has been no discovery by the parties or consideration of the merits by the Court. The only activity thus far has been the briefing of the parties' respective motions. Similarly, in the Texas action, because the parties have spent the past months arguing its removal and remand, there has been very little progress towards resolution. Significantly, however, the Texas court has set a date of March 27, 1995 for the trial of Exxon's nonarbitrable claims. Given the embryonic development of this action, the nine judicial vacancies currently on this Court, and the Court's resultant backlog of cases, it is unlikely that a trial here could

occur until significantly after that March date. Accordingly, factor four weighs in favor of abstention.

Factor five, the source of the rule of decision, weighs in favor of abstention, albeit not heavily. In *Moses H. Cone*, the Supreme Court explained that while the presence of state law issues may in some cases weigh slightly in favor of abstention, "the presence of federal law issues must always be a major consideration weighing against surrender." 460 U.S. at 26. Here, state law issues predominate. The heart of this matter is a dispute over an insurance policy which is governed primarily by state law.[2] Moreover, the state interest in applying its law

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[2] The Underwriters correctly note that since the contract at issue here is for marine insurance, it is governed by applicable rules of federal maritime law. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368 (1955). The larger holding of *Wilburn Boat Co.*, however, is that state law should be employed in marine insurance cases whenever possible. *Id. See also Golden Eagle Liberia v. St. Paul Fire & Marine*, 685 F. Supp. 393, 396 n. 2 (S.D.N.Y. 1988) ("Absent a well-established federal admiralty rule, state law governs the interpretation of marine insurance contracts."), vacated, 718 F. Supp. 1097 (S.D.N.Y. 1988). In fact, since *Wilburn Boat Co.*, the law has developed so that "questions about the interpretation of marine insurance policies are generally . . . decided under local law, rather than as a matter of admiralty law." *Armada Supply Inc. v. Wright*, 665 F. Supp. 1047 (S.D.N.Y. 1987), aff'd in part, rev'd in part, 858 F.2d 842 (2d Cir. 1988). *See also Commercial Union Ins. Co. v. Horne*, 787 F. Supp. 337 (S.D.N.Y. 1992) ("The scope and validity of marine insurance policy provisions and the consequences of breaching them are determined by state law." (citing *Wilburn Boat Co.*)). In view of this

is particularly strong in the insurance area, which has long been dominated by state regulation. *See State Trading v. Assuranceforeningen Skuld*, 921 F.2d 409 (2d Cir. 1990) (citing *Wilburn Boat Co.*, supra).

The Underwriters posit two federal law issues weighing against abstention. First, they argue, the recognition and enforcement of the arbitration clause in Section IIIB of the GCA [sic.] Coverage is a matter of substantive federal law. 9 U.S.C. §§ 201-207. This would be true, but for the fact that Exxon has agreed to arbitrate its claims under Section IIIB. In fact, upon Exxon's motion, the Texas court recently severed Exxon's Section IIIB claims from the action there and stayed them pending arbitration. Consequently, there is no need for this Court to determine the validity of the arbitration clause or to compel its enforcement, and the case presents no issue of federal arbitration law. *See International Shipping Co. v. Hydra Offshore, Inc.*, 675 F. Supp. 146, 153 (S.D.N.Y. 1987), aff'd, 875 F.2d 388 (2d Cir.), *cert. denied*, 493 U.S. 1003, 107 L. Ed. 2d 558, 110 S. Ct. 563 (1989). The Underwriters contend that disputes as to the procedures and scheduling of arbitration present matters for resolution under federal law. These issues, however, are for the arbitrator to resolve, not this Court. *See Matter of U.S. Lines And Liverpool & London S.S.*, 833 F. Supp. 350, 353 (S.D.N.Y. 1993). Similarly, the question of which of Exxon's claims fall under the arbitration clause is for the arbitrator to decide.[3]

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and the Underwriters' failure to identify any specific admiralty rule applicable here, the Underwriters' reliance on *Wilburn Boat Co.* is misplaced.

[3] The Underwriters contend that the Court must retain jurisdiction to determine and segregate arbitrable issues. However, the broad arbitration clause of Section IIIB, which by its terms covers "any differences" (emphasis added) relating to that section, makes such intervention

The second asserted issue of federal law is the possible preclusive effect of certain federal statutes on certain Alaska statutes which are the basis of the liability for which Exxon seeks coverage from the Underwriters. Relying on a decision of the United States District Court for the District of Alaska in In re Exxon Valdez, C.A. No. 89-095 (Order No. 121, Dec. 21, 1992), the Underwriters contend that any liability Exxon might have as a marine cargo owner (the liability at issue here)

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unwarranted; whatever claims Exxon advances under Section IIIB will be arbitrated. *See Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63-64 (2d Cir. 1983) (holding that where parties have executed a broad arbitration clause, court should simply insure arbitration proceeds and allow the arbitrator to determine which issues are arbitrable). It may be, as the Underwriters seem to fear, that issues before the arbitrator will overlap with issues addressed in the judicial forum where Exxon's non-arbitrable claims are heard. This, however, results from the structure of the GCE Coverage, which mandates arbitration for claims brought under Section IIIB but not for claims brought under other sections. Although the issue is not before me it may be that the parties have agreed that the arbitration of Exxon's claims under Section IIIB will have no preclusive effect on the litigation of Exxon's other claims. Exxon notes that the Underwriters' memorandum in support of their motion to determine and segregate arbitrable disputes requests the Court to "enter an order" providing, among other things, that the arbitration of issues under Section IIIB be "without prejudice to Underwriters' rights to raise the same defenses in litigation of non-arbitrable claims for coverage under Section I and III(a) of the GCE agreements" and that Exxon indicated that it would be willing to stipulate that the arbitration have no preclusive effect on the litigation of disputes under Sections I and IIIA.

can only arise under federal law. Consequently, the Underwriters argue, any determination as to coverage for Exxon's cargo owner liability will necessarily involve application and interpretation of federal law.

Assuming all this to be true, the fact remains that Exxon's claims against the Underwriters for coverage are insurance claims, arising under state law. The potential for preclusion arises as only one of several defenses the Underwriters will assert. Moreover, the issue has been already been comprehensively treated, if not definitively resolved, by the Alaska federal court. The core and bulk of this action involves the application of state law in a context where the states have a strong interest in seeing their law applied. In such circumstances, the presence of a federal law issue in a small portion of the overall dispute does not carry the weight described in *Moses H. Cone*. Of course, *Moses H. Cone*'s admonition that the predominance of state law issues should not be accorded undue emphasis must still be heeded. Accordingly, factor five militates toward abstention, but only slightly.

With respect to the sixth factor, the adequacy of the state proceeding to protect the rights of the party seeking federal jurisdiction, the Underwriters argue that the Texas court is inadequate because it may not be bound to recognize and enforce Section IIIB's arbitration clause. *See McDermott v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991) (state courts are not necessarily required to enforce international arbitration agreements under 9 U.S.C. §§ 201-207). This argument is rendered moot, however, by the Texas court's recent order severing and staying the Section IIIB claims pending arbitration.[4] As for the rest of the dispute,

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[4] If a need to compel or enforce arbitration should arise in the future, a federal forum will, of course, be available for that limited purpose. However, the hypothetical

the *Harris County* court--sitting within a tugboat horn's range of the Houston Ship Channel and the Gulf of Mexico--is assuredly competent to handle the marine insurance issues.

Returning, finally, to the third factor, the Court must appraise the desirability of avoiding piecemeal litigation of this dispute. In performing that task, courts of this circuit have considered both the potential for duplicative litigation and the danger of inconsistent adjudications. *See, e.g., De Cisneros v. Younger*, 871 F.2d 305, 308 (2d Cir. 1989); *Bank of New York v. Bin Saud*, 628 F. Supp. 474, 476 (S.D.N.Y. 1986). The Court of Appeals has held that this factor "should be given great weight in the context of declaratory judgment actions. . . ." *Lumbermens*, 806 F.2d at 414. *Accord Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306 (1st Cir. 1986).

Concerning the danger of inconsistent adjudications, the law of this Circuit is that courts must be "particularly careful to avoid piecemeal litigation that could lead to conflicting interpretations of the same insurance policy." *Federal Insurance Co. v. Skopbank*, No. 92 Civ. 2871, 1994 WL 115999, at *3 (S.D.N.Y. Mar. 29, 1994). *See also General Reinsurance Corp. v. CIBA-Geigy Corp.*, 853 F.2d 78, 81 (2d Cir. 1988); *Lumbermens*, 806 F.2d at 414 ("The critical factor to us [in affirming stay of insurers' declaratory judgment action] is the desirability of avoiding piecemeal litigation and the possibility of two interpretations of the same policy language in different courts . . . ."). That, of course, is precisely the danger presented here. The Underwriters' declaratory judgment action implicates the identical policy provisions and defenses at issue in the Texas action. Exxon, therefore, faces the possibility that the two fora will construe the policy provisions differently, leaving Exxon without

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possibility that such a scenario will come to pass is no basis for concluding that the Texas forum is inadequate.

coverage to which it may be entitled. *See Lumbermens*, 806 F.2d at 414.

Looking to the potential for duplicative litigation, the Court notes initially that this action, now stripped of its arbitration aspects, presents the same issues and parties present in the Texas forum. As one Judge of this Circuit has observed, "filing a declaratory judgment action in federal court to resolve state-law issues currently pending in a state court is certainly a peculiar and uneconomical manner of resolving disputes." *Bagdan v. Sony Corp. of America*, 767 F. Supp. 81, 83 (D.Vt. 1991) (Parker, J.). *See also Lumen Construction, Inc. v. Brant Construction Co., Inc.*, 780 F.2d 691, 695-696 (7th Cir. 1986) (stay proper where state court litigation would probably eliminate the need for federal court proceedings).

The duplicative character of this action is particularly significant here because of its implications for comity between federal and state courts. Notwithstanding the Second Circuit's rejection of the Brillhart abstention standard, Brillhart's observation that it is "vexatious for a federal court to proceed in a declaratory judgment suit where another suit [presenting the same issues] is pending in a state court" remains valid. 316 U.S. at 495. *See also Lumbermens*, 806 F.2d at 414 ("The avoidance of piecemeal litigation should be given great weight in the context of declaratory judgment actions because such litigation would complicate and fragment the trial of cases and cause friction between state and federal courts."). Where, as here, there is no significant federal interest to be vindicated by federal court intervention, duplication of the state court's efforts by a federal court is especially offensive.

Additionally, allowing this declaratory judgment action to proceed during the pendency of the virtually identical Texas action constitutes an abuse of the declaratory judgment remedy. *See Fuller Co.*, 782 F.2d at 308 n.3 (noting that propriety of plaintiff's invocation of declaratory judgment

remedy is a relevant consideration under *Colorado River*). As the late Judge Friendly observed, the appropriate use of declaratory judgment actions is to

> "create[] a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it."

United States v. Doherty, 786 F.2d 491, 498 (2d Cir. 1986) (quoting Charles Wright, *The Law of Federal Courts* 671 (1983)). By contrast, it is a "misuse of the Declaratory Judgment Act" to employ it to "gain a procedural advantage and preempt the forum choice of the plaintiff in [a] coercive action. . . ." *Great American Insurance Company v. Houston General Insurance*, 735 F. Supp. 581, 586 (S.D.N.Y. 1990). *See also* 10A Charles Wright, Arthur Miller & Michael Kane, *Federal Practice and Procedure* § 2758 at 631-632 (1983) (The "Declaratory Judgment Act was not intended to enable a party to obtain a change of tribunal from state to federal court. . . .").

The Underwriters' declaratory judgment action falls into the latter paradigm. At the time the action was filed, the Underwriters' perceived need to compel arbitration perhaps provided a basis for a federal action. The arbitration issue gone, however, what remains is an action wherein the federal court is asked to dispense an interpretation of an insurance contract currently being litigated in a state court. The Texas action--which will ultimately resolve all of the issues raised in the Underwriters' complaint--renders this suit wholly unnecessary. The raison d'etre of the declaratory judgment--to provide an adjudicative forum to parties otherwise without one--is not present here. Thus, to allow this action to proceed would be an abuse of the remedy.

CONCLUSION

In sum, I find the considerations relating to the third *Colorado River* factor (avoidance of piecemeal litigation) to be by far the most significant in the context of this case. Therefore, those considerations, which point strongly toward abstention, are entitled to the greatest weight in the *Colorado River* balancing process. Of secondary importance is the fifth factor (whether state or federal law provides the rule of decision), which, because I find a strong state interest in insurance regulation and an absence of significant federal issues, points moderately toward abstention. The fourth factor (the order in which jurisdiction was obtained) also weighs slightly in favor of the Texas forum because that is where a trial can be had sooner. Finally, as set out above, the remaining factors are either not applicable or so evenly balanced as to contribute nothing to the mix. Weighing all the factors, and giving them their appropriate weight in the particular circumstances of this case, I find that the relative importance and weight of the third factor constitute exceptional circumstances requiring abstention.

Accordingly, the complaint is DISMISSED.

Dated: New York, New York
July 18, 1994

LORETTA A. PRESKA, U.S.D.J.

APPENDIX C

APPENDIX C

Exxon has no corporate parent and the following list indentifies Exxon's non wholly-owned subsidiaries:

165550 Canada Limited
172965 Canada Limited
2849518 Canada Limited
AGA Progas a.s
ASHCO Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd
Acquifund Resources Limited
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit beschreenkter Haftung
Advanced Elastomer Systems Do Brasil Ltda.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Air Tankdienst Koeln GbR
Aircraft Fuel Supply B.V.
Al-Jubail Petrochemical Company
Alberta Products Pipe Line Ltd.
Alyeska Pipeline Service Company
AquaAir, Inc.

Aramco Services Company / /
Asakawa Sekiyu K.K.
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bangkok Aviation Fuel Services Limited
Benshu Ekika Gas K.K.
Bayerische Erdoelleitung G.m.b.H.
Beaverhill Resources Limited
Brickwood Holdings Pty. Ltd.
Canada Imperial Oil Limited
Canadian Reserve Oil & Gas Ltd.
Castle Peak Power Company Limited
CeraMem Separations, Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Changi Into-Plane Services (Pte) Ltd.
Chuo Sekiyu Hanbai K.K.
Compagnie Industrielle des Polyethylenes de Normandie, GIE
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Copim St. Lawrence Ltd.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots Petroliers de La Corse
Depots de Petrole Cotiers
Deudan-Holding GmbH
Deutsche Advanced Elastomer Systems GmbH

Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Disma S.r.l.
Dixie Pipeline Company
E S F Limited
EPDMCO, L.P.
ETD Tankdienst Gesellechaft Duesseldorf GbR
Eagle Kenso K.K.
Eagle Reinsurance Co. Ltd.
East Asia Response Private Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwarath Erdoel und Erdgas AG
Emirates National Chemicals Company Ltd.
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Energie Marketing Service GmbH
Enterprise Housing Partners 1992 Limited Partnership
Entrepot Petrolier de Mulhouse (E.P.H.)
Erdgas-Verkaufs-Gesellschaft m.b.H
Erdoel-Raffinerie Deureg-Nerag GmbH
Esso (Overseas) Pension Trust Limited
Esso Antilles-Guyana, S.A.
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Exploration and Production Ireland Limited
Esso France S.A.
Esso Lub'Services
Esso Malaysia Berhad
Esso Raffinage S.A.F.
Esso Societe Anonyme Francaise
Esso Standard Thailand Ltd.

Esso Standard Tunisie S.A.
Esso Technologies et Services (E.T.S.)
Esso Yukong Specialities Ltd.
Etablissements Cloarec
Exxon Asset Funding Company
Exxon Asset Management Company
Exxon Chemical Asset Management Partnership
Exxon Chemical France
Exxon Chemical Paraffins Limited
Exxon Chemical Polymeres SNC
Exxon Mobile Bay Partnership
Exxon de Colombia S.A.
F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Fernkaelte Gescheeftastadt Nord G.b.R.
Flughafen Schwechat Hydranten-Gesellschaft
Fuji Kogyo K.K.
Full Cycle Plastics Pty. Ltd.
G16a (Groep) B.V.
Gasunie Engineering B.V.
Gasunie Warmte/Kracht Emmen B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbei K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane - Lavera
Ges. fur Mineraloelveredlung und Distribution Rheesa mbH
Gewerkschaft Brassert Erdoel und Erdgas GmbH

Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Great Lakes Response Corporation of Canada
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier de Saint-Pierre de Corps (G.P.S.P.C.)
Groupement Petrolier de la Cote d'Azur
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-de-Marne (G.P.V.M.)
Groupement d'Exploitation du Depot de Reception de Chennevis
Guam Response Services Ltd.
Hambrecht & Quist Environmental Technology
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitungs-G.m.b.H.
Henshin Kyowa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokkai Sanshi Co., Ltd. (Chemical)
Hokushin Bussen K.K.
Hokuyu Sekiyu K.K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.
Hydranten-Betriebs-Gesellschaft, G.b.R.
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario General Partnership)
Imperial Oil Limited /
Imperial Oil Resources N.W.T. Limited

Imperial Oil Resources Ventures Limited
Imperial Oil Resources an Alberta limited partnership
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Iranian Oil Participants Limited (Iranian Consortium)
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Momose Shiojiri Stand
K.K. Toresen
K.K. Aizu Generel
K.K. Auto
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Sekiyu Hanbaisho
K.K. Genet
K.K. Genetech
K.K. Genex
K.K. Heian Sekiyu
K.K. Kyosi Shosha
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Tama General K.K.
K.K. Toko
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
KX Industries, L.P.
Kabushiki Kaisha Sankyo Plastics
Kabushiki Kaisha Serubisu

Kai Tak Refuellers Company Limited
Kansai Chuo Sekiyu K.K.
Kanto Kygnus K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hanbai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kemcor Australia Pty. Ltd.
Kemcor Elastomers Ltd.
Kemcor Olefins Ltd.
Kemcor Plastics Pty. Ltd.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Korea Perchem Company Limited
Kosxon Chemical Company Limited
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K.K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kygnus Trading Kabushiki Kaisha
Kyushu Eagle K.K.
L-Net East K.K.
L-Net West K.K.
L12A (Groep) B.V.
L12B/L15B (Groep) B.V.
L14 (Groep) B.V.
L15A (Groep) B.V.
L2 (Groep) B.V.
L5a (Groep) B.V.

LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambas
Les Emulsions de Feyzin at du Dauphine
Liants Routiers de la Vallee de la Loire (LRVL)
Liants Routiers de la Vallee du Rhin (L.R.V.R.)
Liants Routiers du Gard (L.R.G.)
Lilac Sekiyu Kabushiki Kaisha
Lily Sekiyu K.K.
Lithcon Petroleum International (Bahamas) Inc.
Lithcon Petroleum Taiwan Inc.
Long Beach Oil Development Company
MEGAL FINCO
MEGAL GmbH
Maasvlakte Olie Terminal C.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Services Sdn Shd
Manchester Airport Storage and Hydrant Company Limited
McCann Plastics Inc. (Chemical)
McColl-Frontenac Inc.
McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac
Meiji Sekiyu K.K.
Mikawa Bussan K.K.
Mitake Unso K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrank
Mode Wheel Property Limited
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Multi Tank Card B.V.
Mytex Polymers (General Partnership)

N.V. Nederlandae Gasunie
NALCO/Exxon Energy Chemicals Limited
NAM - K 14 B.V.
NAM - K 15 B.V.
NAM - K 7 B.V.
NAM - Pipeline B.V.
NAM -K17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
NAM/MOBIL M9a B.V.
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Name: IORL
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B.V.
New Cure, Inc.
Newcastle Coal Shippers Pty. Limited
Nichiel Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereltungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankte
Noroxo
Northward Developments Ltd.
OSLO Alberta Limited

Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Holdings Private Limited
Oil Spill Response Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Oleoducto de Colombia S.A.
Oleoductos Canerios, S.A.
Osaka General Gas K.K.
Osaka Kygnus K.K.
P. T. Stanvac Indonesia
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
Pacesetter Enterprises Limited
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petrosvibri S.A.
Pier Atlantic Limited
Pipe Line Services, Inc.
Plantation Pipe Line Company
Port-Jerome Gaz (P.J. Gaz)
Portland Pipe Line Corporation
Primaeroel GmbH
Prince William Sound Oil Spill Response Corporation
Progas Limited
Projectbureau W/K S.V.
Quadrant Gas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refinerie Petrolera Acajutia, S.A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam Antwerpen Pijpleiding C.V.

Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Rubiatec Sendirian Berhad
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliera sur Territoire Geneve
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
SERAM s.p.A.
SOVEXOIL Oil Field
Saitema Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S.A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Senboku Oil Kikoh K.K.
Service Aviation Paris (S.A.P.)
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Smiley Gas Conservation Limited
Sociedad Nacional de Oleoductos Ltda.
Sociedad de Inversiones Limited /
Societa Italiana par l'Oleodotto Transalpino S.p.A.
Societa per Azioni Reffineria Padana Olil Minerali-SARPOW
Societe "Geominea-Caen"
Societe Anonyme "Produits Lubrifiants de Madagascar" - PROLU
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dech
Societe Esso de Recherches et d'Exploitation Petrolieres Ess

Societe Francaise EXXON CHEMICAL
Societe Havraise de Manutention de Produits Petroliers
Societe Malgache de Raffinage
Societe Paris-Manche
Societe Paris-Niel
Societe Reunionnaise d'Entrepossage
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad
Societe d'Exploitation & de Developpement d'Operations Comme
Societe d'Exploitation des Garages Les Stations Tour Eiffel
Societe de Manutention de Carburants Aviation (S.H.C.A.)
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe de la Raffinerie d'Alger
Societe des Pipe-Lines de Strasbourg
Societe de Tranports Petroliers par Pipe Line
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de La Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-European
Socony-Standard-Vacuum Oil Company (Petroleum Hastschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kaihatsu K.K.
Standard Service K.K.
Stansted Fuelling Company Limited
Statfjord Transport A/S
Stockage Geologiqua de Gaz de Lavara
Sucre Gas, S.A.
Sueddeutsche Erdgas Transport Gesellschaft mit baschrankter
Sun East (Dublin) Company, Ltd.
Superior Disk Corporation
Syncrude Canada Ltd.

TAR-Tankanlage Ruemlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TCA Plastics Inc.
TEAN Terminal B.V.
TFS Turbo Fuel Services GmbH, Hamburg
TGF Tankdienst Gesellschaft Frankfurt G.b.R.
TGM Tankdienst-Gesellschaft Muenchen GbR
TIBA Speditions GmbH
TLS Tanklager Stuttgart GmbH
Taihei Bussan K.K.
Taisai Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tankanlage A.G., Mellingen
Tankleger Altishausen A.G.
Tankiager Taegerschen AG
Tanklager-Gesellschaft Tegel G.b.R.
Tanklagergesellschaft, Koeln-Bonn G.b.R.
Tecnica Quimica Petrolera, S.A. de C.V.
Terminal Petrolier de Bordeaux (T.P.B.)
Thai Aliphatics Company Limited
Thai C-Center Company Limited
Thai Petroleum Pipeline Co., Ltd.
Thyssenges G.m.b.H.
Tohpren Co., Ltd. (Chemical)
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Chemical Nasu Co., Ltd.
Tonen Energy International Corp.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Filare Co. Ltd.
Tonen Film Company Limited
Tonen Kabushiki Kaisha
Tonen Kagaku K.K.
Tonen Properties Inc.

Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K.K.
Tonex Company Limited
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Trans-Northern Pipelines Inc.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Verbundnetz Gas AG
Wako Jushi Kabushiki Kaisha
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabuskhiki Kaisha
Yuei Sekiyu K.K.
Zenon Environmental Systems Inc. (ZESI)

APPENDIX D

APPENDIX D

Norges Brannkasse Mutual Insurance Co. (Uni)

Skadeforsikringsselskapet Vesta A/S

Arig-Arab Ins. Group (BSC)

Skandia International Insurance Corp.

Storebrand Reinsurance Co., Ltd.

Gjensidige Norsk Skadeforsikring

Arendal Forsikringsselskab A/S

Polaris Assurance A/S

Samvirke Skadeforsikring A/S

Qatar General Ins. & Reinsurance Co.

Hansa Marine Insurance Co.

Norske Triton Insurance Co. Ltd.

(Star Insurance, Ltd.)

Hafnia Forsikring

Baltica Forskiring A/S

Sirius Insurance Co. Ltd., (Lansforsakringar Sirius Industrial & Marine)

Navigators Insurance Co.

Lloyd's & Institute Companies

Insurance Company of North America

Continental Insurance Company

Fidelity & Casualty Company of New York

Fireman's Insurance Company of Newark, New Jersey

Progressive Casualty Insurance Co.

Christiania General Insurance Corporation of New York

Reinsurance Corporation of New York

Worcester Insurance Company

Pennsylvania Lumbermens Mutual Insurance Company

Republic Insurance Company

United Reinsurance Corporation of New York

Colonia Insurance Company

United Fire and Casualty Company

Abu Dhabi National Insurance Co.

Compagnie De Reassurance De L'ile De France

Riunione Adriatic Di Sicurta

Societe Commerciale De Reassurance

Omnium Insurance & Reinsurance Co. Ltd.

Caisse Industrielle D'Assurance Mutuelle/ Languedoc

Eagle Star France

Pool Transport Eagle Star L'independence Pool

New York Marine and General Insurance Co., Through Mutual Marine Office

Yasuda Fire & Marine Insurance Co. Ltd.

Christiania General Insurance Corporation of New York, Through Trident Christiania, Inc.

AIG Oil Rig, Inc.

American Home Assurance Company

National Union Fire Insurance Corporation

New Hampshire Insurance Company

Tokio Marine & Fire Insurance Co.

Nippon Fire & Marine Insurance Company, Ltd.

Yasuda Fire & Marine Insurance Company

Fireman's Fund Insurance Company

Industrial Mutual Insurance Company, Through Hull and Company, Inc.

Indemnity Marine Assurance Co., Ltd.

Switzerland Insurance Company (UK) Limited

The Nippon Fire & Marine Insurance Company, Ltd., (UK) Ltd.

Fuji Fire & Marine Insurance Co. (UK) Ltd.

Folksam International Insurance Co. (UK) Ltd.

Hansa Marine Insurance Company (UK) Limited

Vesta (UK) Insurance Co., Ltd.

Colonia Insurance Company (UK) Limited

Ocean Marine Insurance Company, Ltd.

The Threadneedle Insurance Co., Ltd.

Norwich Union Fire Insurance Society Ltd.

Excess Insurance Company, Ltd.

The Scottish Lion Insurance Co., Ltd.

Yorkshire Insurance Company Limited

Scor (U.K.) Reinsurance Co. Ltd.

Phoenix Assurances Public Limited Company

La Reunion Francaise Soc. Anon. D Assurance Et Des Reassurances

The London Assurance

Sirius Insurance Co., (UK) Plc

Marine Insurance Company, Ltd.

Insurance Company of North America (UK) Ltd.

Northern Assurance Company Limited

London & Hull Maritime Insurance Company, Ltd.

English & Scottish Maritime & General Ins. Co. Ltd.

Prudential Assurance Co., Ltd.

Pearl Assurance Public Limited Company

Assicurazioni Generali S.P.A.

La Concorde Compagnie D'Assurances Contre Les Risques De Toute Nature

Terra Nova Insurance Company, Ltd.

Commercial Union Assurance Co.

Sphere Drake Insurance Plc

Dai-Tokyo Insurance Company (U.K.) Ltd.

Cornhill Insurance Plc

Allianz International Insurance Company Ltd.

Bishopsgate Insurance Ltd.

Leadenhall Insurance Ltd.

Preservatrice Fonciere T.I.A.R.D.

Compagnie D'Assurances

International Insurance Company of Hannover Limited

Lombard Continental Insurance Plc.

Atlas Assurance Company, Ltd.

Sovereign Marine and General Insurance Co. Ltd. of London

Tokio Marine & Fire Insurance Co. (U.K.), Ltd.

Taisho Marine & Fire Insurance Co., (U.K.) Ltd.

Storebrand Insurance Co. (U.K.) Ltd.

Atlantic Mutual Insurance Company

Wausau Insurance Co., (U.K.) Ltd.

New Hampshire Insurance Company

Minster Ins. Co. Ltd.

Turegum Insurance Co.

Polaris Assurance A/S

Cigna Insurance Company of Europe S.A.— N.V.

National Employers Mutual Legal & General Assurance Society Ltd.

Legal & General Assurance Society Ltd.

Chandos Insurance Co. Ltd.

Dominion Insurance Co. Limited

Sumitomo Marine & Fire Insurance Co. Ltd.

Orion Insurance Company plc

Skandia U.K. Insurance plc

Yasuda Fire & Marine Insurance Company of Europe, Ltd.